STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs Supreme Court No. **123641**

DELEON DESHON TATE,
Defendant-Appellant,
/

Recorder's Court No. 99-12470
Court of Appeals No. 237039

123641

SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

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Table of Contents

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

MICHIGAN RULES OF EVIDENCE

COUNTERSTATEMENT OF JURISDICTION

The People acknowledge this Court's jurisdiction.

SUPPLEMENTAL COUNTERSTATEMENT OF QUESTIONS

I. Since a statement that is never made can be neither voluntary nor involuntary, a defendant who does not acknowledge making a statement has no standing to challenge its voluntariness. Here, Defendant denied making the typewritten statement admitted into evidence in the first place, and the interrogating officer testified that Defendant made a voluntary statement, after being apprised of his *Miranda*-rights. Did the trial court err in referring the question of its authenticity to the factfinder?

Trial court said:	*No.*
Court of Appeals said:	*No.*
Defendant says:	*Yes.*
People say:	*No.*

COUNTERSTATEMENT OF FACTS

The People adopt the counterstatement of facts contained in their original Brief in Opposition.

ARGUMENT

I.

SINCE A STATEMENT THAT IS NEVER MADE CAN BE NEITHER VOLUNTARY NOR INVOLUNTARY, A DEFENDANT WHO DOES NOT ACKNOWLEDGE MAKING A STATEMENT HAS NO STANDING TO CHALLENGE ITS VOLUNTARINESS. HERE, DEFENDANT DENIED MAKING THE TYPEWRITTEN STATEMENT ADMITTED INTO EVIDENCE IN THE FIRST PLACE, AND THE INTERROGATING OFFICER TESTIFIED THAT DEFENDANT MADE A VOLUNTARY STATEMENT, AFTER BEING APPRISED OF HIS *MIRANDA*-RIGHTS. THE TRIAL COURT DID NOT ERR IN REFERRING THE QUESTION OF ITS AUTHENTICITY TO THE FACTFINDER.

Standard of Review

This Court has requested the parties to address three points: (1) whether the trial court erred by declining to rule on the voluntariness of a typewritten statement Defendant insisted he never made; (2) what evidence Defendant presented to support his claim that the statement he did not make was coerced; and (3) whether Defendant would be entitled to present additional evidence at a second *Walker*-hearing.[1] While the first and third points are questions of law, reviewable *de novo*,[2] the second question is a factual question, which is answered by the record.

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[1]*People v Walker (On Rehearing),* 374 Mich 331 (1965).

[2]*See, eg, People v Sexton (After Remand),* 461 Mich 746 (2000); *People v DeLisle*, 183 Mich App 713 (1990).

Discussion

While the People will rely upon the arguments in the original response to Defendant's application, this Court has raised some additional points that require additional comment:

A. As with determining the size of an object that does not exist, deciding if a statement which was never made was voluntary is an exercise in futility.

In order to dispel what it called the "inherently compelling pressures" that arise in the context of custodial interrogation, in *Miranda v Arizona*[3] the United States Supreme Court decreed into law a system of safeguards which, it presumed, would serve to dispel the pressure, and permit a suspect to exercise his constitutional rights intelligently. Accordingly, it crafted the now-famous litany of *Miranda*-warnings, which police now incant before each interrogation, cautioning those under arrest that they have the right to counsel and the right not to speak — and that anything they say may come back to haunt them later, in court.[4] Moreover, when a suspect exercises any of the *Miranda*-rights, then the police must cease questioning — either until the suspect reinitiates the contact, if he asserts his *Miranda*-right to counsel,[5] or for a "decent interval" to allow the accused the chance to rest and reassess his intentions, if he has asserted his *Miranda*-right not to speak.[6] In the former case, the

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[3]*Miranda v Arizonia,* 384 US 436, 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[4]*Miranda, supra* at 479.

[5]*See, eg, Edwards v Arizona,* 451 US 477, 101 S Ct 1881, 68 L Ed 2d 378 (1981); *Arizona v Roberson,* 486 US 675, 108 S Ct 2093, 100 L Ed 2d 704 (1988).

[6]*Michigan v Mosley*, 423 US 96, 96 S Ct 321, 46 L Ed 2d 313 (1975); *People v Slocum,* 219 Mich App 695 (1996).

suspect may reinitiate contact merely by asking a police officer what is going to happen;[7] in the latter case, all the police need do is "scrupulously honor" his request to cease the interrogation, and they may seek to question him again, at a later time.[8]

As noted in the People's original response to the application, the record conflicts over the factual issue of whether Defendant ever asserted his Constitutional rights before making his *handwritten* statement, or whether the *handwritten* statement was involuntary.[9] This, however, does not appear to be the Court's primary concern — for, since Defendant denied ever making the *typewritten* statement in question, the real issue before the Court is whether, or under what circumstances, a defendant can litigate the voluntariness of a statement he insists he never made. While one could craft a rationale for permitting such a challenge, doing so as a matter of course strikes the People as an both exercise in existential futility, and an indulgence toward litigants that a moment's reflection should show to be both unwarranted, and at odds with common sense:

Reduced to its essence, Defendant's argument rests upon two largely contradictory and mutually exclusive assertions:

- I did not make the statement the police say I made; it is a fabrication.
- On the other hand, if I actually did make the statement, then the police forced me to make it.

There are, it seems to the People, some circumstances in which a defendant may logically and legitimately make such apparently contradictory claims: if, for example, a defendant claimed that

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[7]*Oregon v Bradshaw*, 462 US 1039, 103 S Ct 2380, 77 L Ed 2d 405 (1983).

[8]*Michigan v Mosley, supra.*

[9]*Compare*, EH 5-27 with 27-48

he was too intoxicated to make a statement — or, perhaps, under hypnosis or physical duress at the time — the defense could reasonably claim (a) as he never consciously agreed to its contents, the statement was not his; and (b) whatever he did say was the product of governmental coercion. In such a case, the critical question is not so much the content of the statement, but the circumstances surrounding it — which make the voluntariness of whatever was said the critical point at issue. This is because the Law should not hold one accountable for anything said during the course of any sort of physical or mental abuse: one undergoing torture may not, after all, recall everything said to the tormentor — while the inquisitors may record every detail at their leisure, in excruciating detail. And, as shown it the original Brief in Opposition, this appears to be the central holding of *Lee v Mississippi*,[10] and related cases.

By contrast, in *this* case, the police are saying that the Defendant made a voluntary statement after receiving his *Miranda*-warnings — while Defendant is saying that the police made everything up. Under *these* circumstances, the conflicts in testimony go to the statement's existence — not its voluntariness — and the evidentiary worth of the evidence will depend upon whether the jury believes the police, or the Defendant. It is in *these* circumstances that the question of standing is presented — since a defendant can have no standing to challenge whether a statement he never made was, nevertheless, his free and voluntary act. Such an argument is, in essence, mutually exclusive — and presents the same issues of standing which this Court has recognized in the context of other constitutional rights.[11]

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[10]*Lee v Mississippi*, 332 US 742, 68 S Ct 300, 92 L Ed 330 (1948).

[11]*See, eg, People v Smith,* 420 Mich 1 (1984).

The People note that a confession is not an affirmative evil to be avoided. Accordingly, there appears to be no reason routinely to permit a defendant to make an alternative argument which says, in essence: "On the other hand, if I'm lying about *that*, then would you believe *this*?" While amusing when offered by Maxwell Smart, there is no reason for a court of law to indulge similar flights of fancy by a criminal defendant.

The People acknowledge that this may present a defendant — or defense counsel — with a delicate tactical choice in many cases: *ie,* whether to challenge the statement's authenticity, or to acknowledge the statement and challenge its admissibility. The constitution does not, however, proscribe confronting a criminal defendant with any tactical dilemmas;[12] and, the People note, the problem largely disappears if the litigants concentrate their efforts on establishing Truth, rather than trying to devise the most advantageous tactical position from which to argue contingent angles on alternative sides of a factual issue.

As noted in the original Brief in Opposition, there is support in state law for a contrary approach to this problem.[13] However, subject to some reasonable limitations, it appears to the People that there is no basis in logic or common sense to permit a defendant to argue in favor of the proposition that a statement he did not make was nevertheless involuntary: as hard as it is to prove that a statement a defendant actually did make was voluntary statement, proving that a statement that he *did not make* was voluntary transcends the problem of merely proving a negative, and ventures

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[12]*See, eg, McKune v Lile,* 536 US 24, 41-44, 122 S Ct 2017, 153 L Ed 2d 47 (2002); *Jenkins v Anderson*, 447 US 231, 238, 100 S Ct 2124, 65 L Ed 2d 86 (1980); *Bordenkircher v Hayes*, 434 US 357, 363-365, 98 S Ct 663, 54 L Ed 2d 664 (1978).

[13]*See, eg, People v Neal,* 182 Mich App 368 (1990).

into reaches of existential philosophy that courts are ill-equipped to decide as a matter of law. Moreover, common sense suggests that there can be no answer to a question which presumes a negative: courts can no more rule on the voluntariness of a statement the Defendant insists he did not make than engineers can determine the best design for a bridge to cross a river that does not exist.

The Court of Appeals recognized as much in *People v Spivey*:[14] there, the trial court declined to hold an evidentiary hearing when the defendant claimed that the police fabricated portions of his confession. Noting that the purpose of such a hearing was "to prevent prejudice" when a defendant has given "inculpatory statements to the police which are...legally inadmissible due to the coercive circumstances surrounding the confession,"[15] the Court found that the voluntariness of a statement was a question of law, which courts should decide outside the presence of the jury. However, the Court noted, other facets of any statement by the defendant — including factors "such as credibility, truthfulness and whether the statement had been made at all" — were questions for the factfinder's resolution at trial.[16]

In this case, as in *Spivey*, the critical factual question is not a claim of coercive circumstances surrounding the confession, but rather whether the statement was made in the first place: Defendant himself testified that the signature on his statement was placed there because the police "copied it on a copier or whatever," and the statement at issue was simply not his.[17] By contrast, in the case

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[14]*People v Spivey*, 109 Mich App 336 (1981).

[15]*People v Spivey, supra* at 37.

[16]*People v Spivey, supra* at 37.

[17]EH, 42-43.

of *People v Neal*,[18] upon which Defendant relies, the Defendant claimed that the police *coerced his signature on a fabricated confession*, rather than using a copier to forge it — which renders the case factually and legally distinguishable from both this case and *Spivey* — which the *Neal* court itself noted, in limiting its holding to case where the defendant "claims that he involuntarily signed a statement and that the statement was fabricated by police...."[19]

In this case, Defendant's failure to acknowledge that the statement under review was his should, in any sanely-run system of law, mean that he lacks standing to challenge its admission. Instead, as the critical factual question involves not the circumstances surrounding the statement, but rather the factual question of whether the statement was ever made in the first place, the appropriate resolution would be for the trial court to admit it — with clear instructions to the factfinder that it cannot use the statement against Defendant if it finds the confession to be a police fabrication.[20]

Such an approach, it seems to the People, is entirely consistent with the Supreme Court decisions in *Lee v Mississippi*,[21] and *Boles v Stevenson*[22] — for reasons outlined in the original Brief in Opposition — and should be the rule adopted in this case.

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[18]*People v Neal*, 182 Mich App 368 (1990).

[19]*People v Neal, supra* at 372.

[20]And, in fact, the People would have no objection to a further instruction that the factfinder could take any fabricated evidence offered by either party into account in determining the credibility of other evidence, as well.

[21]*Lee v Mississippi, supra.*

[22]*Boles v Stevenson*, 379 US 43, 85 S Ct 174, 13 L Ed 2d 109 (1964).

Accordingly, this aspect of Defendant's claim is without apparent merit.[23] If, however, this Court finds the legal question at issue to be sufficiently in question as to entertain doubts about the Court of Appeals' resolution of the point at issue and wish to grant leave to appeal, the People would be glad to discuss the matter at greater length.

B. Defendant's claim was that the typewritten statement at issue was a fabrication, and he produced no evidence that it was in any way coerced.

The second question this Court wished the parties to address was whether Defendant presented any evidence that the typewritten statement introduced into evidence at his trial was coerced.

In point of fact, the answer is, quite simply, "No": Defendant testified that was never advised of his rights and requested counsel before making a *handwritten* statement — after being slapped, intimidated, and promised his release if he made a statement. However, he insisted that he had never made the *typed* statement which was the subject of the suppression hearing.[24] Accordingly, since nothing in the record supports a claim that the *typed* statement was in any way coerced, his claim rests upon a non-existent factual record, which cannot justify its exclusion.

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[23]Moreover, even if this Court concludes that the trial court should have ruled on the theoretical voluntariness of a statement Defendant denied making, the appropriate remedy would not be to reverse his conviction: as shown below, a more appropriate resolution would be to remand the cause to the trial court to make the factual finding which Defendant insists was lacking.

[24]EH, 27-48.

C. Nothing in the Constitution guarantees a defendant multiple bites at the same apple.

The final question this Court requested the parties to address is whether Defendant is entitled to a second Walker-hearing, at which he may introduce additional evidence to support his claim of coercion. It is the opinion of the People that such a course should be open to a litigant in only two circumstances — *ie*, to permit a party to introduce evidence of which it was unaware at an earlier hearing; or to prevent a miscarriage of justice. Neither circumstance appears present in this case.

The admissibility of evidence presents a preliminary question of law,[25] and a challenge to the admission of evidence presents questions collateral to issue of defendant's factual guilt or innocence.[26] Thus, where the basis for challenge is known prior to trial[27] — and the defense has no impediment to raising issue at that time — there is no reason to permit relitigation of the question, merely so that the defendant can raise additional points that, having lost the first time, he wishes to resurrect. In these circumstances, a party must stand or fall on the record made;[28] to do otherwise encourages gamesmanship, rather than promoting a search for the truth.

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[25]MRE 104(a).

[26]*People v Ferguson,* 376 Mich 90, 93-95 (1965); *People v Heibel*, 305 Mich 710, 712-713 (1943); *People v Mitchell*, 44 Mich App 679, 683-684 (1973) *rev'd oth grds* 402 Mich 506 (1978). *See also, People v Soltis*, 104 Mich App 53, 55 (1981).

[27]*People v Heibel, supra* at 712; *People v Ferguson, supra* at 95

[28]*Cf, People v Cutler,* 73, Mich App 313, 319-320 (1977); *People v Seigel,* 95 Mich App 594 (1980).

In some circumstances, however, a "miscarriage of justice" may well result from failing to permit a party to reopen the proofs: where a defendant can make tenable showing that counsel's performance was inadequate, that critical evidence was kept out of the initial hearing by mistake, or that *irrefutable* evidence of the merits of one side's claim has been uncovered, the People acknowledge that reopening the proofs may be the fairest thing to do. There is, however, no reason to craft a special rule for this case: exiting rules on ineffective assistance, relief from judgment, or newly discovered evidence should suffice.

Here, nothing on record — or offered by Defendant on appeal — would warrant reopening the proofs: either Defendant could not bring himself to acknowledge that he had, in fact, made statement at issue, or he was arguing police fabrication in complete good faith. If the former, Defendant has already made his tactical choice, and there is no reason for this Court to permit him to have another go at suppressing his statement on a different theory; if the latter, the factfinder has already rejected his claim of police fabrication, and absent some newly-discovered proof on the point, there is no reason to relitigate the question.

Conclusion

Accordingly, as the Court of Appeals reached the appropriate resolution of Defendant's claim, there is no compelling need for this Court's intervention, and it may simply deny leave to appeal.

RELIEF

WHEREFORE, this Court should deny Defendant leave to appeal.

In the alternative, should this Court consider the point inadequately addressed in the application, subsequent briefs, or oral argument on the application, this Court may wish to consider granting leave to appeal on the question of Defendant's standing to contest the voluntariness of the statement he claims he never made.

In the alternative, this Court should remand to the trial court for a further articulation of facts.

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